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ABSTRACT

Intended to provide practical suggestions for reporters and editors, this manual presents the basic law of libel and invasion of privacy in the United States. Following an introduction noting that these are general principles of law and do not fully represent the laws of each state, the guide discusses various aspects of libel law: (1) definitions of libel and slander; (2) identification of person(s) in defamatory prose; (3) truth as the best defense against libel suits; (4) "privileges" awarded to libel defendants, including reporting of official proceedings, court cases related to constitutional privilege, and other privileges; (5) the standard of "care" imposed by law on the media in defamation suits; (6) opinion/criticism; (7) miscellaneous liabilities; (8) retractions or corrections; and (9) invasion of privacy. (HTH)

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WRITING AND EDITING COMMITTEE

Libel and Invasion of Privacy Manual

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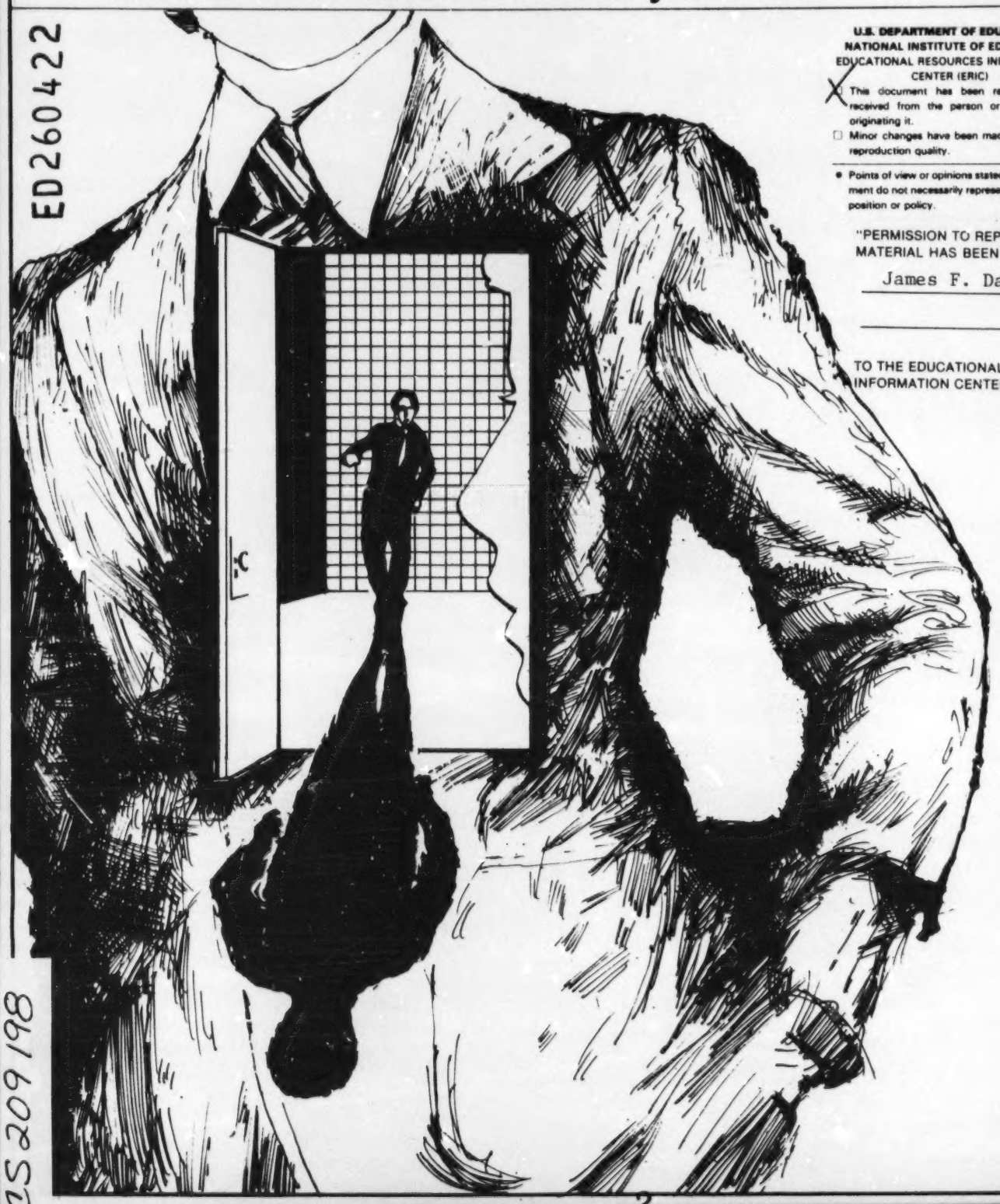

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This booklet was prepared under the direction of attorney James P. Brody at the Milwaukee-based law firm of Foley & Lardner. Working with him were attorneys Robert A. Christensen, John R. Dawson and Thomas L. Shriner Jr., of that law firm.

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Introduction

The purpose of this manual is to present the basic law of libel and invasion of privacy in the U.S.A., and some practical suggestions for reporters and editors. It is hoped that it will alert you to some legal pitfalls and ways in which protections in the law can be utilized.

One important reservation and warning must be noted — in the brief space available, it is possible only to state some general law. It is impossible to note the many variances in the law which exist in different states. Some of the law set forth here does not fully or correctly represent the law in each state. Therefore, while general principles and potential areas of protection are correctly stated, *you should consult your attorney to ascertain the specific nature and application of this law in your state.*

1. Libel and slander — definition

Generally, "libel" is defamation in written, printed or other physical or relatively permanent form. "Slander" relates to spoken words and transitory gestures. Whether TV and radio broadcasts are governed by libel or slander law depends on various circumstances under rules which vary in different states.

While definitions may vary somewhat from state to state, generally defamation is considered to be a communication which tends to damage the reputation of another. A common test is that it would lower the person's reputation in the eyes of the community or deter third persons from associating with him.

The "community" in which one's reputation suffers need not be the entire community reading a defamatory statement. It is enough that a "substantial minority" would view the publication as defamatory.

The law requires that words be given reasonable, not strained constructions, in deciding whether they are capable of defamation. While there is an "innocent construction" rule in some jurisdictions, more courts hold that a statement subject to different meanings is capable of defamation if even only one of those meanings is defamatory — even though the other meanings are innocent, not defamatory.

Whether words are capable of defamation is frequently raised early in a case. If the court rules that the words *are* defamatory as a matter of law, that stands as the ruling in the case; if the court rules as a matter of law that the words are *not capable* of defamation, there can be no jury issue on that point, and the case will be dismissed; if the court finds that the words are not necessarily defamatory, but are *capable* of defamation — that a jury *could* find them to be so — a jury issue exists for the trial, and the jury will decide whether the words are defamatory.

Defamation need not be expressly stated, but can be implied from a news story, or a combination of story and accompanying picture. A defamation need not be contained wholly in one edition of a newspaper, but may be made up of statements from different publications. For example, a series of news stories on a subject may be considered together by a court, and a story on day No. 1, even though not defamatory of a person, might become defamatory when read together with the story on day No. 3 which adds identification, or some additional "facts."

Some courts have different rules for "libel per se" and "libel per quod;" some no longer make that distinction. Suffice it to say that whether or not they are called "libel per se," some words and charges are so clearly capable of defamation that their presence in a story should alert the editor to special care unless their use definitely falls within one of the privileges discussed below. In such a category (without attempting to describe all such statements) are charges that a person:

1. Has embezzled, stolen, robbed, or committed a similar crime;

2. Is guilty of dishonesty or fraud;

3. Is a drunk, drug addict, victim of a loathsome disease;

4. Is guilty of unethical conduct or malpractice in his profession or unethical or deceptive practices in his business;

5. Is guilty of immoral conduct (adultery, fornication, etc.);

6. Is politically subversive.

Some single words alone are sufficient to constitute libel — in category 1 above, such obvious charges as "thief"; in category 4, "quack" or "ambulance chaser"; in category 6, "enemy agent." There are many far milder words and charges which can be considered capable of defamation by the courts. It has been ruled, for example, that it is capable of defamation to say that a man has been "fired" (although obviously "firing" may be due to causes which would not be defamatory), or that a legislator is administratively inept. And, as noted above, words innocent in themselves can be defamatory if they are in a context which gives rise to a defamatory implication. In short, does the news story or editorial contain, expressly or by implication, a charge which, reasonably construed, would tend to lower a person's reputation in the community?

II. Identification of person(s) defamed

Even a scurrilous accusation of wrongdoing is not defamatory unless the community understands the accusation is made "of and concerning" a particular individual or, in some cases, a group of individuals. To be defamed, one must *reasonably* be understood to be the subject of the defamatory statement; he must be "identified."

Except to the extent affected by the imposition of standards of care by the *Gertz* case discussed later, whether the reporter or editor intended to identify a particular individual or group in a defamatory story, or even if they thought they did not, is irrelevant. The only question is whether that individual is recognized by the community from what is published about him in the newspaper.

Similarly, an individual may be defamed even though the newspaper intended its story to refer to someone else. Again, the pertinent issue is what the public understood, not what the reporter intended. For example, a newspaper would probably be liable for defaming all John Does in the city if its libelous story referred only to John Doe, without further specification.

The same question (can readers determine who an article is about?) arises when a story refers not to an individual but to a group of persons. It is possible to defame an entire group, and each individual member of that group. Thus, an article which states that "the bank's board of directors knew of the illegal payoffs" is probably capable of defaming each director of the bank.

As the group grows in size, it becomes less likely that any one individual will reasonably be understood to be the subject of an article about the group generally. For example, the statement in a large city that "city police accept bribes" is probably not defamatory of any one policeman. However, an accusation that "all city police in the First Precinct take bribes" probably is capable of defaming each officer assigned to that station.

A reference to fewer than all of even a relatively small group may not be defamatory of any one individual, again depending upon the size of the group. Thus, it may defame no one to state that most professional football players under age 25 take drugs. In contrast, it might defame each member of the group to state that "some" of the local team's coaching staff (consisting of only six men) take drugs.

It is also possible to defame an individual who is not mentioned at all in a story. For example, a libelous expose on the illegal activities of a local business may reflect necessarily upon the practices of the proprietor, depending upon how the article is written. Similarly, false accusations about a two-man partnership may be understood by readers as referring to either or both of the individual partners and may therefore be defamatory as to them. On the other hand, a less direct relationship between the subject of an article and another will not generally support a claim of defamation by the person not named. For example, a father generally is not defamed by disparaging remarks about his son.

While the principles outlined above are easily grasped, their application frequently causes difficulty. It is not necessary that a person be named in an article for it to be understood as referring to him. Identification can be by implication, by circumstantial similarity, by indirect association or as a result of any extrinsic fact by which readers tend to conclude an individual is the subject of an article. The imagination of readers and the variety of ways in which the subject of a "risky" story can be unintentionally identified should never be underestimated.

There have been many instances in which conscientious efforts to not identify the subject of an article have not succeeded because of the perceived necessity to include some minimal information in the article for editorial purposes. An un-named person may be identified by reference to an unusual physical feature (e.g., a waitress said to be 6 feet, 2 inches tall); by the section of town in which he resides; by his hobbies or club memberships; by the unusual kind of car he drives; by an unusual combination of interests (e.g., an airline pilot known to fly kites in the local park); or by his particular business associations (e.g., there may be only one tavern owner in town who used to be a deputy sheriff).

Not only is circumstantial identification possible as described above, it is possible for the subject of a defamatory story whose identity is well disguised in the defamatory article to be identified in a later article, or later in a series of articles. More troublesome, and more frequent, an individual who is the object of an investigative series of articles will not be named or otherwise identified in any one of them but will become known by an accumulation of identifying features spread throughout the series. For example, the first article may refer to him only as an ex-councilman. The second or third may add the innocent observation that he is 44. The fourth story in the series may note that he has four children. At that point, if not before, the ex-councilman probably has been so identified as to claim to have been defamed by the entire series.

The converse of the foregoing is the important admonition against including insufficient identification in a story. What may be true about Joe Doakes, the baseball player, the intended subject of a story, may be entirely false and defamatory as to Joe Doakes, the local retailer. Care must be taken to avoid identifications of persons which are so general as to encompass more than the single individual to whom reference is intended. If the address and / or occupation of Doakes, the baseball player, is not in the story, the retailer may also have been identified, unless something else in the story supplies the identification, or otherwise makes it clear that it does not relate to the retailer.

States' laws vary on the issue of identification, particularly with respect to group libel, size of group, etc.

III. Truth — the best defense

A plaintiff may not recover in a libel or slander action if the allegedly defamatory statement is true. (A few states have laws which condition the defense of truth on an absence of improper motive, e.g., "malice," but the constitutionality of such a condition is questionable.) Generally, it is held that proof of "truth" does not require 100% literal truth, but "substantial" truth. It would not be 100% correct to say "Jones stole $10,000" if he actually stole only $9,900," but it would be substantially true, and would defeat the plaintiff except under unusual factual circumstances.

But it is not enough, in proving "truth," merely to establish that you have accurately or "truthfully" quoted someone. The truth of the *ultimate* fact is the issue. (Accurately quoting someone is a defense only in cases of some privileges, discussed below — or, of course, where the person being quoted claims you have misquoted him, and that is the libel.) Thus, proving that you accurately quoted the chief of police who said, in a non-privileged situation, "Jones killed his wife," is not enough proof if Jones sues you for libel. Unless you had a privilege, you would have to prove the *ultimate* fact — that he *did* kill his wife — to escape liability.

Traditionally, the defendant has had the burden of proving truth in a defamation suit. It has not been the plaintiff's burden. The defendant has had to prove "truth" by a preponderance of the evidence, or similar test. In suits by public figures and public officials (see IV B below) that burden has shifted to the plaintiff. And now that at least negligence as to truth has to be proved even by the private plaintiff in suits against the media (see V below), some authorities and courts say that even the private plaintiff has the burden of proving falsity. Other courts have ruled to the contrary. Which test will apply at trial in a particular state should be ascertained from counsel. But the answer should not affect the newspaper's efforts to ascertain the truth. All stories which have "libel potential" should be written with care, and where "truth" may be one of your defenses, you should have probative evidence of truth, even though you might not have the legal burden of proving it.

Keep in mind that "proof of truth" and "belief in truth" are different. A reporter may have ample reasons to believe reasonably and in good faith that a story is true. That may be enough in a suit by a public official or public figure. But if the issue at trial is whether or not it is true, his basis for belief may be valueless. The question is: what proof can you offer at trial? If the reporter has only "proof" in the form of confidential documents he may not disclose, or statements from a confidential source who will not be a witness, there is no proof. (As discussed below, that particular problem would apply also in a *Times / Sullivan* case, brought by a public official or public figure.) If his sole proof is a witness whom he believes, but who will likely be a poor witness, some thought should be given to finding corroborative proof in the sensitive case . . . an extra witness or witnesses, or additional documents. Having multiple witnesses can avoid the chill that would otherwise set in if the sole witness died, left the state for a destination unknown, or is destroyed on the witness stand.

Reliance on secondary sources is sometimes misplaced. A personal view of a document is much safer than merely relying on a description, even though the source is "reliable." Likewise, the source of a "fact" should be checked in addition to the "reliable" person who quotes the source. These are elements of good reporting, but they are also involved in the legal matter of proving truth at a trial (and proving reasonable, non-negligent care as to truth when that is the issue.)

Finally, a point that is perhaps more journalism than law, but involves both. Use the English language carefully. Not infrequently, libels are claimed because the writer has used a poor word, or used one imprecisely, or has been careless in organizing a story, thereby creating implications that were not intended. Often, too, a potentially dangerous story can be safely de-fanged without prejudice to the story by eliminating "dangerous" words, writing very carefully where there may be questions, and, with a close eye to the meaning of words, writing precisely what is intended. Plaintiff's lawyers, when they argue that a word has a defamatory meaning, quote the meaning of the word in the dictionary!

IV. Privileges

In the law of defamation, "privileges" are given a defendant in various circumstances. If a situation is "privileged," and the privilege is not abused, the libel / slander defendant is free of liability even though he has published a false and defamatory statement about a person.

The policy consideration for allowing privileges is that in some circumstances, it is socially or politically desirable that people (and the press) be able to speak freely without fear of libel liability — that in those circumstances the value of freedom of communication outweighs the harm to the individual. Some privileges are "absolute," e.g., a judge is absolutely privileged with respect to what he says on the bench. Other privileges, including some of those enjoyed by the press, are subject to certain conditions. Privileges exist in varying forms under the common law, constitutions and statutes of the states, and under the Constitution of the United States.

IV A. Privilege to report public official proceedings

1. General rule

The general rule is that an action for defamation cannot succeed against a story which does no more than repeat, accurately and fairly, the substance of what has been said or done in the course of a public official proceeding. However, this general rule has been modified by statute in several states so that the exact extent of and conditions upon this privilege vary from state to state. Moreover, some states qualify the privilege based on the intent of the publisher, e.g., denying a privilege if the report is published for a malicious purpose or not in good faith. In some jurisdictions, the privilege does not extend to headlines.

Generally, for the privilege to apply, a news report of the public official proceeding must be both accurate and fair. Thus, if a reporter does not correctly state what occurred, this privilege is lost. Likewise, if two sides have been presented in the proceeding being reported, an account which gives only one side would not be fair. On the other hand, so long as reasonable accuracy and balance are preserved, the account need not include every subject or every detail concerning each subject mentioned in order to be fair.

This privilege extends only to what was said or done in the course of the proceeding itself. Statements made by participants in the proceeding outside the course of the proceeding are not included. Thus, there is a privilege to report what a lawyer says in a trial, or a legislator says during a legislative proceeding, but not what the lawyer says during a recess, or the legislator in a press conference.

Moreover, the official proceeding must be public. Therefore, if the official body meets in secret session, *i.e.*, a closed session of the legislature or an *in camera* court proceeding, the privilege probably does not apply, even to a completely accurate report of the closed session.

2. Proceedings to which the privilege applies.

"Proceedings" clearly includes such formal proceedings as an open session of the state or federal legislature, or a matter before a judge in open court. A hearing or other proceeding which is statutorily mandated as a condition of action by a state or federal administrative body or official, particularly where the action to be taken is quasi-judicial in character, is treated the same as a legislative or judicial proceeding. However, beyond such clear examples, the court decisions vary as to what is a "proceeding." The proceedings discussed below are included within the privilege in at least some states.

a. Less formal administrative proceedings of the federal and state bodies discussed above may also be included.

b. Official statements by chief executive officers of state and federal agencies upon a subject within their jurisdiction. (Warning! This does not include interviews, and statements made at a press conference which do not have sufficient official status are probably not included).

c. Official proceedings of municipalities and other agencies below the state level.

d. Public proceedings before private organizations conducting state-delegated duties, e.g. bar associations.

Warning! Legal counsel should be consulted to ascertain local law.

The concept of "proceedings" is not necessarily limited to hearings or oral communications. It also includes written submissions once they are acted upon by the judicial, legislative or administrative body or officer whose proceedings are privileged. *Some* states also accord the privilege to some written proceedings without the requirement of action by the body or officer to which they are submitted.

Reports of criminal complaints, information and indictments, are within the privilege since those documents reflect official action. The privilege may, but does not certainly, include investigative reports and arrest records.

Stories based on civil complaints and other civil pleadings do not stand on the same footing since those documents are filed by private parties and therefore do not inherently reflect official action. Some jurisdictions require that some judicial action be taken upon a document filed in court before the privilege attaches with respect to it, in civil proceedings. Mere filing, or a request for judicial action on papers filed, is enough in other states. Check with your counsel to see which law apples.

This privilege never applies to the contents of a complaint, affidavit or deposition which is merely given to a publisher by a lawyer, and has not come within the "proceedings" rule. Therefore, great care should be exercised in reporting attorney press conferences.

IV B. Constitutional privilege — Times / Sullivan, et al

Prior to 1964, defendants in defamation suits could, where the defenses were available, defend on the ground of truth or conditional privileges. They could also engage in fair comment on public people, particularly in matters of public concern, if they had a proper basis for the comment. This right of fair comment, sometimes called a privilege, was generally restricted to comment or opinion based on true or privileged facts. It did not extend to misstatements of fact.

In 1964, in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and later cases, the United States Supreme Court declared that in the interests of free communication, even misstatements of facts should not automatically give rise to legal liability. The Court announced a privilege which exists as a matter of First Amendment right. This privilege provides immunity against a defamation suit by a public official or public figure unless the defamation was published with "actual malice" — not the common law, ill-will type of "malice," but a "constitutional malice" defined as (i) knowledge by the publisher that what was being said or written was false, or (ii) reckless disregard as to whether or not it was false.

Moreover, the plaintiff (official or public figure) has the burden of proving "actual malice," not merely with a preponderance of the evidence, but "clear and convincing evidence." He must in effect prove that the defendant entertained serious doubts about the truth of what was published. This test is not a mere "reasonable man" or "prudent publisher" test, nor is it a "gross negligence" test. It tests whether the publisher had an honest belief (not a reasonable belief), that what was published was true.

As discussed below, this standard does not apply to suits by "private" plaintiffs. They have a lesser burden to sustain.

The U.S. Supreme Court has also put some restrictions on damages in all suits (at

least those against the media). It said in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) that presumed or punitive damages are no longer allowable in defamation cases *unless* the plaintiff proves "actual malice" as defined by it. Actual damages have to be proved, not presumed, but they can include, as well as provable money damages (such as lost wages, etc.) loss of reputation, mental suffering, etc.

Who is a public official? Decisions indicate that the office need not be elective. There are judicial suggestions that some lower echelons of officialdom may not qualify. Courts have found such varying officials as the following, in the context of the particular case, to be public officials: a court clerk, a deputy village marshal, policemen, judges, senators, members of the board of education, and a city tax collector.

The editor can define "public officials" with reasonable security, so long as he does not venture too far into the lower echelons or too far afield. However, the definition of "public figure" is much more difficult. The court has said there are two kinds of public figures, "pervasive" public figures and "limited-purpose / vortex" public figures. "Pervasive" public figures have such power and influence that they are deemed public figures for all purposes, such as candidates for public office, civic leaders, TV and movie celebrities, etc. The "limited-purpose / vortex" public figures have been defined as people who thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues which are involved.

The pervasive public figure is reasonably recognizable. But the vortex figure is not; review of the cases establishes a fuzzy pattern. While public figures can be "involuntary," it has been said that they are rare. Voluntary entry by the "figure" into the limelight is a factor that helps create a "public" figure. The degree of access to the press enjoyed by the figure before the incident at issue is another factor considered by the courts. A newspaper cannot bootstrap itself into immunity by itself pushing a private person into the limelight.

The substantive nature of the controversy is supposedly no longer a factor — the Supreme Court said in *Gertz* it would look instead at the status of the "figure," and it withdrew from the rule in *Rosenbloom v. Metromedia*, 463 U.S. 29 (1971), that gave protection if the plaintiff was involved in a matter whose subject was of great public interest and concern, even though he was not a public figure or official. As discussed below, a few states follow the *Rosenbloom* rule, and give extra protection to the defendant if the matter is of public interest and concern, even though the plaintiff does not meet the public figure test. But even in some states where the *Rosenbloom* rule has been rejected, and under federal law, it would appear that if the matter is of social significance, of true public interest and concern, the chances of establishing a public figure are better than if the substance of the matter is private in nature. Even courts which purportedly look only to the figure's "status" appear sometimes to give consideration to the substance of the dispute. Courts have noted however, that mere "newsworthiness" does not make a matter one of public interest and concern. Must there be an actual *controversy* into which the vortex figure injects himself? Some decisions certainly indicate that to be the case.

It is recommended that the definition of "public figure" be explored with legal counsel, and that anyone who is interested in reading directly the changed rationale of the court read *Rosenbloom v. Metromedia* (cited above); *Gertz v. Welch* (cited above); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) [Mrs. Firestone, involved in a highly-publicized divorce case, not public figure.]; *Hutchinson v. Proxmire* 443 U.S. 111 (1979) [a researcher who had a government grant — not a public figure.], *Wolston v. Reader's Digest*, 443 U.S. 157 (1979) [a grand jury witness cited for contempt — not a public figure.]

The knowledge that a person named in a potentially dangerous story is a public official, or probably a public figure (tread carefully in the latter area) may give some sense of security, knowing that ultimately in a suit the paper will be immune unless the plaintiff can clearly prove (i) actual knowledge of falsity, or (ii) reckless disregard. But even though the ultimate legal test of care might thus be more favorable, the paper should follow the same rules of careful reporting as if the plaintiff had only the lesser burden of proving negligence. Indeed, since sometimes the story about such a person is potentially more damaging, and the subject more significant, the degree of care exercised might well be greater. The defense lawyer will not object if the editor has done more than necessary to ascertain truth!

Therefore, to avoid a finding of "reckless disregard" (a jury may obscure the line between "negligence" and "reckless disregard" — or so may a court), the newspaper should be able to show that it did carefully pursue the story, relied on good sources, carefully considered anything contrary, and wrote carefully. The sources should be persons who can be demonstrated to be reliable, and the more sources, the better. Proving "honest belief" requires identifying the sources. If your sources are "confidential," and the reporter refuses to identify them, the court is apt to disallow testimony about having relied on such sources, or worse, strike your *Times / Sullivan* defense completely. Don't rely slavishly on clips from old stories, or even from earlier stories in the same series. If in the meantime the reporter or editor has learned something contrary, it will be hard to persuade a jury of "honest belief" if you print a "fact" from the clip now known to be erroneous. In short, you should be able to show that when you published the story, you had an honest belief in its truth, and as proof thereof, that you had reasonable grounds for that belief, and that you were not negligent. Technically, that latter proof would go beyond what is necessary, but trying to avoid a "reckless disregard" charge without it may be difficult.

What subject areas are protected by the *Times / Sullivan* rule? Does it protect writings only about public matters, or does it cover "private" matters, too? As to public officials, it has been ruled that even non-public subjects may be written about with constitutional privilege so long as they have a bearing on the official's fitness for office. The privilege would probably extend relatively far for "pervasive" public figures — so long as the subject has some rational relationship to the public facets of the person's life. As to "limited-purpose / vortex" figures, the subject area field is narrower, and would have to be related to his involvement in the particular controversy.

IV C. Other privileges

Times / Sullivan and public proceedings are not the only privileged communications. Various other privileges have also been recognized, in varying degrees in different states. However, the other privileges are rarely applicable to the media, and are usually conditioned in some way (normally at least good-faith belief in the truth is required), so that a jury question is presented. They should *not be relied upon* as the basis for running a story, but sometimes can be used to defend once a story is attacked.

These privileges include consent, self-defense, communications on a matter of interest common to the speaker and the recipient, communications for the protection of the recipient, and communications to public officers seeking action. Except for consent, these privileges are based on the principle that communications intended in good faith to protect an interest recognized as legitimate should not be subjected to liability for a good-faith mistake. Consent, if it can be proved, is a complete defense.

V. What standard of "care" does the law impose on the media in private-plaintiff defamation suits?

Until 1974, legal liability was imposed for false and defamatory publications without regard to fault. Simply put, if the story was false and defamatory, the publisher was liable, even though he had acted reasonably and in good faith, unless protected by a privilege or other defense.

As discussed above, this ancient rule was swept away by the United States Supreme Court's decision in the *Times / Sullivan* cases as to suits by public officials or public figures. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), the court reaffirmed the *Times / Sullivan* constitutional privileges enjoyed by a defendant in a defamation suit brought by a "public official" or a "public figure." As to the third category of plaintiffs, "private" plaintiffs who were neither public officials nor public figures, the court said:

"We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

While not every state has yet specifically responded to the foregoing holding, most of those which have, have adopted a negligence standard for suits by *private* plaintiffs, at least for media defendants. That is, for a plaintiff to recover from the media, he must prove that the publisher was at "fault" — that he was "negligent" with respect to ascertaining the truth of the statement at issue.

A few states have applied the higher *Times / Sullivan* (public-official, public figure) standard of actual malice where the subject matter is one of general public interest. Other states have adopted yet other standards unique to the state adopting it. To know the standard in your state you should consult local counsel.

Within those states which have expressly adopted a "negligence" standard, there is a division. Some states follow the standard "reasonable man" approach that is common to most negligence cases; other states have adopted a "reasonable journalist" approach, somewhat akin to the medical malpractice standard. One state has adopted a "reasonable-belief-in-the-truth-of-the-publication" standard.

Where the only applicable standard is one of "reasonableness," however defined, any suit resulting from the publication will almost always be submitted to a jury. A jury's decision as to whether the defendant was "reasonable" or "negligent" is not likely to be set aside — only in cases of gross error. Thus, it is well to err on the side of being more than "reasonable" in ascertaining the truth when writing a potentially libelous story about a private individual. Experience suggests that it is difficult to convince a jury that a story which is wrong was, in fact, carefully prepared. At the trial, it is always easy for plaintiff's counsel to demonstrate the several ways in which the paper should have proceeded, and could easily have learned the truth. Everything done to double-check the story will help. A jury may accept thorough research and scrupulous fairness as adequate proof of "reasonableness." If, on the other hand, the jury has a basis for feeling that the paper should have done more, its natural sympathy for the plaintiff (and perhaps an underlying attitude against the press), can easily result in an adverse decision.

VI. Opinion — criticism

As noted above, the common law of defamation historically has recognized the importance and necessity of permitting public commentary about persons responsible for or involved in matters of legitimate public concern. Criticism of such persons was considered privileged and the publisher could not be held accountable for even libelous comment if he could show his expression to be honestly held and to be based upon provable facts, or upon facts already known to the public. The privilege of "fair comment" was limited, however, to commentary or opinions which pertained to the person's public position or public responsibility.

In a few states, the fair comment privilege has evolved to prevent liability of commentators regardless of the accuracy of the facts upon which their opinion is based as long as their opinion is honestly held and reasonably based upon what the commentator believes the facts to be. However, most states still limit the privilege to those expressions which are premised upon accurate, underlying facts which themselves are either disclosed in the commentary or are already publicly known.

Under the protection afforded by this privilege, generally newspapers may freely express their views, reactions and commentaries upon a wide variety of public officers and candidates for office, of course, as well as the activities of persons / entities which are of legitimate interest to the community such as the performance and offerings of sports figures, restaurants, movies, hotels, educational institutions, entertainers, etc. The criticism of such persons / entities may be severe, and even damaging in fact, as long as honestly expressed and based upon disclosed, factual bases which are correct. The privilege is lost, however, if the motive of publication is bad faith or some personal sense of revenge, ill-will or hatred. To the extent the "target" of the comment is a public figure or official, the *Times / Sullivan* rule also protects, of course, as to factual misstatement.

The privilege of fair comment to some uncertain degree has been supplanted by the recent expansion of the scope of protection recognized under the Constitution. In the *Gertz* case discussed earlier, the Supreme Court recognized that the expression of pure opinion was constitutionally protected without regard to the "accuracy" or effect of such expression or to the motivation of the publisher. The court's observations that "there is no such thing as a false idea" under the First Amendment has provided basis for argument that any expression of "opinion" is absolutely immune from liability. The protection afforded by the law for intemperate, uninformed, misinformed or misstated commentary, however, is probably less sweeping.

As the law continues to develop in this area, the safest guideline to follow is one which requires expressions of opinion to neither state nor imply false facts as bases for the opinion. This is easier stated than practiced. But, as a general rule, editors will want to keep in mind that even an expression of opinion may be held capable of defamation if the context or content of its expression suggests, either directly or indirectly by implication, the existence of non-disclosed, defamatory facts which are false.

Although the protection given expression of opinion is broad, it is protection which frequently is illusory because of the extreme rarity of "pure opinion." It often is difficult, if not impossible, to distinguish between a statement of opinion and a statement of fact, even though the consequences of that distinction are significant: the former may be absolutely immune from liability and the latter may not be.

Thus, a restaurant critic has great leeway to express the view that "the restaurant's fish has little flavor." However, his review becomes potentially libelous if expressed in such a way, or in a context, which states or implies "facts" . . . e.g., that the restaurant's advertised "fresh walleye pike" is "frozen," or is a lesser variety of fish, if those "facts" are false.

Plainly, one may not seek protection from liability by couching statements of fact in the form of opinion. It is defamatory and actionable, if false, to say that: John Doe is a murderer of small children, in my opinion."

VII. Miscellaneous observations

You can be held liable, of course, for defamation (or invasion of privacy) in advertisements you publish. Photographs, as noted above, can constitute, or be an ingredient in, a libel. A picture of a wounded bank robber and a young woman giving him first aid may itself create no problem; but an accompanying story which says the robber was accompanied by his "girl friend" might add the bit necessary for a libel claim by the young woman unless the picture caption notes that the pictured young woman was a passerby. Mistakenly publishing John Smith's picture as a convicted felon, instead of the real felon, John Doe, exposes you to libel liability, of course.

Editorials, written or expressed in cartoons, while mainly opinion, can contain factual assertions, expressly or by implication, and those factual assertions must be judged by libel law.

Headlines can be a source of trouble, particularly if they name a person (or identification is achieved by printing the person's picture under the headline.) While story and headline are supposed to be read together in determining truth and defamation, some courts may take a different view if the headline is libelous in and of itself (even though "corrected" by the story), and the person is named in the headline or is identified by an adjacent picture.

VIII. Retractions or corrections

Neither a retraction nor a voluntary correction is ever a complete defense to an action for defamation. Therefore, they can be two-edged swords. Retracting will, in virtually every jurisdiction, provide a defense, in some cases a total defense, against punitive damages. In addition retraction or correction should normally minimize, although probably not eliminate, general damages. However, a retraction in which error is conceded makes it virtually impossible to assert truth as a defense.

Retraction should, therefore, be approached very carefully. If, by the time a retraction is demanded, the publisher has concluded that the story is false, retraction is essential. Failure to retract under that circumstance could show common-law malice. Contrariwise, a story the publisher remains convinced is true should not be retracted. The gray area in between presents the difficult choice, which should always be made with the aid of counsel.

A demand for a retraction is not required to be labeled as such, and any letter of complaint by the subject of a story should be examined carefully and timely to be sure whether a retraction is indicated. There are time limits for an effective retraction in many jurisdictions.

In many jurisdictions a retraction must be unqualified to be effective, i.e., the publisher must squarely disavow all elements of the story which are claimed to be false. On the other hand, some jurisdictions give effect to a publication of the complainant's statement of the "true facts," particularly if the truth cannot be ascertained with reasonable certainty by the publisher. Where there is a statute regulating retraction, there must be careful compliance with its terms.

If possible, avoid repeating the defamation in the retraction. If the retraction does not satisfy legal requirements, the repetition might compound the original libel. Usually, it is possible to convey the concept of a retraction and the true facts without repeating the defamation. In some jurisdictions, a repetition of the original defamatory statement being retracted may be necessary to claim the full benefit of the retraction. Legal counsel ought to be consulted in deciding whether to retract, and its form.

IX. Invasion of privacy

Under the general heading "invasion of privacy," lawyers classify four separate torts, each of which has some arguable relationship to an individual's expectation that he will be left alone in certain circumstances. Other than this common thread, the "privacy" torts are quite distinct in their elements. In some states, privacy law is statutory, while in others it is judge-made.

After defamation, privacy claims have become the most common claims brought against the press. A key distinction to remember between defamation and invasion of privacy is that truth is not a defense to most privacy claims (only to "false light" claims.)

A. *Intrusion.* The tort of intrusion is what the layman normally thinks of when "invasion of privacy" is mentioned. It can be committed by physically barging into a private place (regardless of whether the entry constitutes trespass) or by surreptitiously using mechanical means of enhancing perception (wiretaps, bugs, parabolic microphones, telephoto lenses).

Note that the intrusion plaintiff need not prove that the information gained by the intrusion was published. The tort is complete when the intrusion occurs. This tort should be of particular concern to journalists considering "undercover" or "sting"-type investigative reporting.

However sensitive the information obtained, it is usually a defense to an intrusion claim that the plaintiff's conduct was open to public view.

B. *Publicity given to private facts.* It is actionable to give publicity to matters concerning the private life of another, if such matters are of a kind highly offensive to a reasonable person and not of legitimate public concern. "Publicity" requires a broader dissemination than the publication to a single person required for a defamation claim. Because the matters publicized must be "private," it is usually a defense to a publicity claim that the matter was one of public record or otherwise widely known or available. Note, however, that public figures as well as private persons are entitled not to have their private lives publicized.

The courts have been protective of the press, even when the matter published is quite offensive, if it is newsworthy. Generally speaking, the less newsworthy something is, the more likely it is that an offensive story or picture will subject the publisher to liability. Even in well-intentioned stories about the victims of disease or poverty, for example, great care must be exercised in identifying individuals in embarrassing or demeaning circumstances. The courts have taken pains not to second-guess editors on the question of newsworthiness (whether a matter is of legitimate public concern). Nevertheless, there are certain kinds of matters which courts have tended to say are not legitimate public concern. Great care must be exercised in publishing matters made confidential by law (like juvenile court or divorce records) and "where is he now?" stories, which repeat the ancient sins of reformed citizens.

C. *False light.* In the states which recognize this tort, liability is imposed on the publisher of a falsehood which need not be defamatory, but which tends to give a false impression of the plaintiff.

Because falsehood is an element of this tort, constitutional defenses applicable to defamation cases also apply. Thus a public official claiming to have been portrayed in a false light must prove knowledge of falsity or reckless disregard, and all false light plaintiffs must show that the defendant was somehow at fault for the misstatement.

D. *Appropriation.* The tort of appropriation allows a plaintiff to recover for the unconsented use of his name or likeness for trade or advertising purposes. (It does not preclude the use of a name or pictures in news stories; however, a name or news photo, even though properly used in a news story, may not be used for advertising without consent.) The tort is, in a sense, a type of offense against property, the law recognizing that a person has the right to control the commercial use of his identity.

Not all of the states which recognize some form of "invasion of privacy" recognize all four of these torts. Moreover, the specific elements of any of the "privacy" torts and the defenses to them may vary from state to state.

Conclusion

Since you are constantly exposed to liability for libel and invasion of privacy, it is desirable that you be familiar with the libel and privacy law of your state, and that you be alert to the legal dangers in proposed publications. Frequently, with a minimum of effort, those dangers can be avoided or at least reduced, by careful collection of proof and careful writing, without damage to the story.

Truth in a news story is obviously desirable from a journalistic point of view. From a legal point of view, it is a far-reaching defense to a libel action. If proved, it is an absolute defense. Whether a statement is true is sometimes subject to debate, and inevitably the press will sometimes err, but even in those cases, the more the paper has gone to establish the truth, the better off it will be. A record of careful news-gathering will help to avoid "reckless disregard" in a *Times / Sullivan* case; likewise, it will serve to negate negligence in a private-plaintiff suit.

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